

TABLE OF CONTENTS – Chapter 5

5 Domicile	Page #
A. Determining a Taxpayer's Residence or Domicile	5-1
1. Introduction	5-1
2. Statutory Definitions	5-2
3. Case Law Definition of Taxpayer's "Residence" and "Domicile"	5-3
a. <i>Phillips v South Carolina Tax Commission</i>	5-3
b. <i>Gasque v Gasque</i>	5-5
c. <i>Ravenel v Dekle</i>	5-5
4. Department Interpretations and Administrative Law Court Decisions	5-6
a. <i>F. Abbott Brown v Charleston County Assessor</i>	5-9
b. <i>D. Bradlee Hodson v Charleston County Assessor</i>	5-10
5. Residency and Domicile Key Principles – Summary	5-12
B. Residence and Domicile Determination and Tax Rules for Specific Individuals	5-13
1. Separate Residences or Domiciles of Husband and Wife (Matrimonial Domicile)	5-13
a. Property Tax	5-14
b. Income Tax	5-16
2. Foreign Domicile or Expatriate (Person Working Outside the United States)	5-16
3. Student	5-18
4. Military Servicemember and Servicemember's Spouse	5-19
5. Alien	5-19
6. Children and Parents	5-19

Chapter 5 - Domicile

A. Determining a Taxpayer's Residence or Domicile

1. Introduction

Often, questions arise whether an individual is a resident or nonresident of South Carolina for purposes of computing South Carolina income tax, especially if he has lived in another state or country during the tax year or in another state or country for some years. Whether an individual is a South Carolina “resident” for income tax purposes is a factual determination based largely on a person’s intent to make South Carolina his home where he will remain, or return when away, as demonstrated by his own actions.¹

A South Carolina resident moving to another state or country for a temporary or indefinite time without intent of making the new place his home to which he will return when away does not change his domicile from South Carolina to another state or country. In such instances, the individual (although not physically present in South Carolina) remains domiciled in South Carolina and a South Carolina “resident” for individual income tax purposes and is subject to the filing requirements for South Carolina resident individuals. Likewise, a nonresident working in South Carolina or spending winter months in South Carolina does not automatically become a South Carolina resident for income tax purposes.

Comment: Unlike some states that tax a person as a resident who lives in the state for a specific period of time, such as 183 days, South Carolina does not have a minimum time that must be spent in the state to be presumed a South Carolina resident for individual income tax purposes.

The determination of whether an individual is a resident or nonresident affects his tax base, sourcing of income, and eligibility for income tax credits. In general, South Carolina does not tax a resident on his worldwide income. Instead, a South Carolina resident is taxed on his worldwide personal service income, but is not taxed on his worldwide (non-personal service) business income.² In contrast, a nonresident individual is only taxed on his share of personal service income earned in South Carolina, and his allocated and apportioned share of business income derived from South Carolina.³ A proportion of the federal personal exemption amount and applicable itemized deductions or standard deduction are allowed in computing a nonresident’s South Carolina taxable income.

¹Commission Decision #89-99 (July 28, 1989) concluded that a taxpayer’s actions suggested he was a resident of South Carolina and not a resident of Saudi Arabia where he intended to work for 10 years so he could qualify for the Saudi retirement plan.

²See **Chapter 6** of this publication for a more complete discussion.

³See SC Code §12-6-1720(1)(b).

To alleviate the double taxation of personal service income by more than one state, South Carolina allows resident individuals an income tax credit for taxes paid to another state on their personal service income.⁴

2. Statutory Definitions

South Carolina Title 12, Chapter 6, “Income Tax Act” defines the terms resident individual, nonresident individual, and part year resident. A resident individual is “an individual domiciled in this State.”⁵ A nonresident individual is “an individual other than a resident individual or a part year resident.”⁶ A part year resident is “an individual who is a resident individual for only a portion of the tax year.”⁷ The term “domicile”, however, is not defined in South Carolina Title 12, Chapter 6, the “Income Tax Act,” or in other chapters of Title 12, “Taxation.”

The terms “residence,” “legal residence,” “domicile,” and “nonresident” appear in Title 12 and throughout South Carolina law, such as in the property tax, probate, divorce, and driver and hunting licenses statutes. Definitions of these terms are contained in Chapters of Title 12 other than Chapter 6 (income taxes) or in other titles of the South Carolina Code, but the definitions vary depending on the purpose and legislative intent of the section to which the definition refers.⁸

Since “domicile” is not defined legislatively in our income tax statutes, case law has been primarily used to provide its meaning.

⁴**Note:** Form SC 1040TC, “Tax Credits” and accompanying worksheet allows a part year resident individual to claim a credit for taxes paid to other states. Note that Code Section 12-6-3400 allows the credit only to resident individuals. See **Chapter 7** of this publication for a more complete discussion.

⁵SC Code §12-6-30(2).

⁶SC Code §12-6-30(2).

⁷SC Code §12-6-30(3).

⁸SC Code §7-1-25 defines the term “domicile” for purposes of voter identification, in part, as a “person’s fixed home where he has an intention of returning when absent.” It also provides “[f]or voting purposes, a person has changed his domicile if he (1) has abandoned his prior home and (2) has established a new home, has a present intention to make that place his home, and has no present intention to leave that place.” Act No. 27 of 2011 added factors to consider in determining a person’s intention regarding his domicile for voting purposes. This definition of domicile for voting purposes and factors regarding a person’s intent reflect the general domicile principles applicable for South Carolina income tax purposes.

3. Case Law Definition of Taxpayer's "Residence" and "Domicile"

The rules of domicile have evolved primarily from case law.⁹ The term "residence" has been construed by the Courts in many connections (*e.g.*, taxation, divorce, political office qualification, college tuition rates) and its meaning for one purpose may not be the same as that for another purpose.

The significance and meaning of the word "domicile" for South Carolina income tax purposes is demonstrated in three leading South Carolina Supreme Court decisions: *Phillips v. South Carolina Tax Commission*,¹⁰ *Gasque v. Gasque*,¹¹ and *Ravenel v. Dekle*.¹²

Phillips dealt with the state of domicile of an individual living in South Carolina who claimed to be a resident of Virginia. The Court determined the meaning of "domicile" for South Carolina individual income tax purposes. *Gasque* is a divorce case concerning whether a spouse had "resided" in South Carolina for at least one year prior to the commencement of the divorce action. The Court found that for purposes of the divorce statute the term "reside" is equivalent in substance to "domicile." *Ravenel* reviewed the Constitutional requirements for an individual to be a "citizen and resident" of South Carolina to be eligible for the office of South Carolina Governor. The Court discussed how domicile is determined or changed and the types of evidence used to establish a new domicile.

While *Gasque* and *Ravenel* are not income tax cases, each relies on *Phillips* and provides insight into the meaning of "domicile." Each of these cases is discussed in detail below.

a. *Phillips v. South Carolina Tax Commission*

Mr. Phillips, the taxpayer, claimed to be a resident of, and domiciled in, Virginia. He owned a furnished apartment and farm in Virginia, paid Virginia poll tax and income tax exclusive of income earned and reported in South Carolina, and voted in Virginia. He spent about six months each year in South Carolina with his family in connection with a non-continuous lumber business in Jasper County, South Carolina. Mr. Phillips filed his South Carolina income tax returns annually and reported only income earned by him in South Carolina.

During the years at issue, South Carolina law imposed an income tax "upon every individual residing in the State of South Carolina."¹³ The statute provided that this tax shall be

⁹Case law is sometimes referred to as common law. It refers to law developed through court decisions, rather than through statutes. *Phillips v. South Carolina Tax Commission*, 195 S.C. 472, 12 S.E.2d 13 (1940); *Gasque v. Gasque*, 246 S.C. 423, 143 S.E.2d 811 (1965).

¹⁰195 S.C. 472, 12 S.E.2d 13 (1940).

¹¹246 S.C. 423, 143 S.E. 2d 811 (1965).

¹²265 S.C. 364, 218 S.E. 2d 521 (1974).

¹³SC Code of 1932, §2437.

levied, collected and paid annually with respect to the entire net income of the taxpayer. The Department asserted that the taxpayer was “residing” in South Carolina and that South Carolina taxes were due on his entire net income, including interest and dividends, regardless of their source. Mr. Phillips argued that he was not subject to the South Carolina income tax imposed on every individual “residing” in South Carolina since he was a resident of, and domiciled in, Virginia.

The issue before the South Carolina Supreme Court was whether the taxpayer was a “resident” of South Carolina. The Court held that the word “residing” as used in the income tax acts refers to legal residence which is equivalent to domicile. The Court concluded that the legal residence or domicile of Mr. Phillips was Virginia. The Court reasoned that the lumber business is essentially transient in character (depending on the supply of available timber which is cut in the course of a few years,) and Mr. Phillips’ stay in South Carolina from time to time in connection with this business, while extending over a considerable period, has been of a temporary nature, and was never coupled with any intention of making South Carolina his home or to abandon his domicile in Virginia, where he continued to live a portion of each year.¹⁴

In reaching its conclusion, the Court discussed the term “legal residence” and “domicile” and found:

“The phrase ‘legal residence’ is sometimes used as the equivalent of domicile”; and it seems to me that in connection with the matter of the assessment of an income tax no sound distinction can be drawn between “legal residence” and “domicile.”

The term “domicile” means the place where a person has his true, fixed and permanent home and principal establishment, to which he has, whenever he is absent, an intention of returning. The true basis and foundation of domicile is the intention, the *quo animo*, of residence.” (Citations omitted).

“The question of a person’s place of residence is to be determined by his own intention, accompanied by his own voluntary act.” (Citations omitted)

Comment: Although *Phillips* is a 1940 decision, the general principles announced in *Phillips* continue to be cited today by courts, the South Carolina Attorney General’s Office, and the Department as general principles of domicile.

¹⁴The Court concluded that it was of no special significance that Mrs. Phillips had been a member of the Board of Trustees of a school district in Jasper County (she was not legally qualified to hold the position since she was not a qualified elector) or that their son graduated from high school in South Carolina and was registered as a resident receiving in-state tuition at the Citadel. For a discussion of the facts associated with Mrs. Phillips’ domicile, see the “Matrimonial Domicile” section of this chapter.

b. Gasque v. Gasque

Mr. Gasque, a native of South Carolina, was employed by the United States Government in Washington, D.C. for about 14 years, and for most of this time lived with his family in and around Washington, D.C. He was born, raised, educated, and married in South Carolina. He was admitted to the South Carolina Bar and to practice before the United States Supreme Court, both upon affidavits that he was a “legal resident” of South Carolina. Mr. Gasque contended that his absence from South Carolina was solely because of his employment and that he never had any intention of abandoning his domicile in South Carolina.

The issue before the Court was whether a spouse had “resided” in South Carolina for at least one year prior to the commencement of the divorce action. Based on the evidence, the Court concluded that South Carolina was the domicile of Mr. Gasque and that he never intended to abandon it living outside of the State in connection with his employment.

In reaching its conclusion, the Court reasoned that:

1. The term “reside” as used in the statute was equivalent in substance to “domicile.” Citing the definition of “domicile” used in *Phillips*, the Court held that the question of domicile is largely one of intent to be determined under the facts and circumstances of each case.
2. A temporary absence from one’s domiciliary state solely because of government work or employment does not effect a change of domicile within the meaning of divorce laws, in the absence of clear proof of an intent to abandon the old domicile and acquire a new one.

c. Ravenel v Dekle

Mr. Ravenel intended to run for governor of South Carolina believing that he met the Constitutional eligibility requirements of a candidate. Mr. Ravenel claimed to be a citizen and resident of South Carolina since birth. He maintained that his recent 15½ year absence from South Carolina was of a temporary nature and for the purpose of attending school and receiving professional training outside of South Carolina. He never planned to maintain a permanent presence in New York and he intended to return to South Carolina.

The Constitution of South Carolina reads in part: No person shall be eligible to the office of Governor who...shall not have been... “a citizen and resident” of this State for five years next preceding the day of the election. Mr. Ravenel contended that the term “resident” and “citizen” are synonymous and that the word resident in the Constitution requires only that he have been domiciled in South Carolina.

The Court ruled that “citizen” and “resident” were not the same, but that the term “citizen” was based on domicile. ‘Resident,’ in the domiciliary sense is embodied within the term ‘citizen’. It follows therefore that if the words ‘and resident’ be construed as meaning anything other than a requirement of actual physical residence such language would be surplusage. The Court concluded both that Mr. Ravenel had not been a resident (*i.e.*, he had not met the Constitutional requirement of actual physical residence in South Carolina to be eligible

to be elected to the office of the Governor) for the requisite amount of time and that he had not been domiciled in South Carolina during his absence.¹⁵

The Court reviewed Mr. Ravenel's dwelling places, voting record, income tax returns filed, club memberships, car registration, and addresses on documents and determined the overwhelming weight of evidence showed that he was an actual resident of, domiciled in, and a citizen of New York.

In reaching its conclusion, the Court set forth the following principles to be used in establishing "domicile" and stated:

1. In *Gasque* our Court had occasion to define the word domicile as follows:

And (t)he term 'domicile' means the place where a person has his true, fixed and permanent home and principal establishment, to which he has, whenever he is absent, an intention of returning. Such is a generally accepted definition of the term.

2. It is generally recognized, as we did in *Gasque*, that intent is the most important element in determining the domicile of any individual.
3. It is also elementary, however, that any expressed intent on the part of a person must be evaluated in the light of his conduct which is either consistent or inconsistent with such expressed intent.
4. Other elementary propositions which require no citation of authority are that a person can have only one domicile at a time; one maintains his prior domicile until he establishes or acquires a new one.
5. A person may have more than one residence, but cannot have more than one domicile or be a citizen of more than one state at the same moment.

4. Department Interpretations and Administrative Law Court Decisions

Based on case law, it has been the Department's longstanding position that the term "domicile" for South Carolina income tax purposes means that place where a person has his true, fixed, and permanent or indefinite home and principal establishment and to which, whenever he is absent therefrom, he has the intention of returning.¹⁶

¹⁵The definition of "resident" differs for purposes of eligibility to run for office of South Carolina Governor and for state income tax purposes. An individual can be considered a South Carolina "resident" for income tax purposes without being physically present in South Carolina during the tax year. The case is relevant for tax purposes because of its principles used in establishing "domicile."

¹⁶See Commission Decision I-D-359 citing the definition of domicile given in *Phillips v. South Carolina Tax Commission* 195 S.C. 472, 12 S.E.2d 13 (1940).

Thus, the Department considers an individual is domiciled in South Carolina (even if he lives outside of South Carolina) and subject to the “resident” income tax laws of South Carolina where he has:

- a. the intention to maintain South Carolina his permanent or indefinite home and
- b. the intention to return to South Carolina when away.

Generally, once an individual has established domicile in South Carolina, his domicile remains in South Carolina until the individual establishes a new domicile in another state or country. Further, once an individual’s domicile is established in a state, it can be difficult to change to another. A change in domicile to another state is not made simply by establishing a person has moved out of South Carolina. A resident individual who moves outside of South Carolina who does not intend to return to South Carolina must establish a new domicile in another state or country to be considered a “nonresident.” If a new place of domicile is not established, then South Carolina remains the individual’s state of domicile and will continue to be even after many years of living outside of South Carolina. For example, a person who moves to a foreign country for work is still considered to be domiciled in South Carolina unless he becomes a permanent resident of the foreign country. Likewise, a long-haul truck driver who left South Carolina and lived in his tractor trailer without establishing a fixed, permanent residence is still considered to be domiciled in South Carolina.

Similarly, the Department considers that an individual has established a new domicile outside of South Carolina and is no longer subject to the income tax laws of South Carolina as a “resident” where it can be shown that he has:

- a. abandoned his old domicile in South Carolina (*i.e.*, left South Carolina with no intent to return)
- b. actually established a new permanent and fixed place of abode in another state or country,
- c. severed connections with South Carolina and
- d. actually moved to another state or country with the intention of residing in that state or country for a permanent or indefinite time and will return to that place when temporarily away.

Whether an individual is domiciled in South Carolina or not is a factual determination based largely on a person’s intent. Evidence of a person’s intent includes his express statements as well as his conduct. When a person’s intent and conduct are inconsistent, the person’s actions may be more telling as to his true intent.¹⁷ Nevertheless, a person’s actions may be less

¹⁷Commission Decision #89-99 (July 28, 1989) concluded that a taxpayer’s actions suggested he was a resident of South Carolina and not a resident of Saudi Arabia where he intended to work for 10 years so he could qualify for the Saudi retirement plan.

meaningful when the circumstances suggest the actions are easily reversible and were carried on deliberately to influence future decisions about domicile.

Some of the factors the Department considers when determining if an individual is a “South Carolina resident” or a “South Carolina nonresident” for individual income tax purposes are listed below. This list is not intended to be all inclusive.

1. Property:

- Address listed on legal documents, such as deeds, wills, and contracts
- Location of residences
- Location of owned or rented real property, businesses, motor vehicles, and boats¹⁸
- Qualification for the reduced 4% property tax assessment ratio on a primary residence¹⁹

2. Employment and Financial Information:

- Location of employment (state or country where wages are earned)
- Whether income taxes or other taxes dependent on domicile have been paid in the state the person claims domicile
- Address listed on federal, state, or local tax returns
- Address listed on bank statements, bills, tax notices
- Location of bank accounts

3. Licenses and Registrations:

- Place registered to vote
- Address on car registration
- Address on driver’s license
- Location of professional or trade licenses

4. Family:

- Where spouse and other family members reside
- Location claimed to be the domicile in prior years
- If claimed by another as a dependent, the state where that person resides
- Status of citizenship or nature of visa admitting person to the United States or the foreign country

¹⁸S.C. Op. Atty. Gen. (June 12, 2009). This opinion concerned whether a taxpayer’s legal residence was South Carolina for purposes of the special 4% property tax assessment ratio and the homestead exemption. The taxpayer lived in South Carolina, was registered to vote in South Carolina, and had two vehicles registered in South Carolina. The taxpayer also had a Winnebago and a car registered in Florida that remained in Florida for use on vacations. The opinion concluded that vehicle registrations in Florida can be a factor to consider in determining domicile for purposes of the homestead exemption available for a taxpayer 65 and older, but this fact is not conclusive. All factors indicating the intent of the taxpayer must be considered in determining domicile. Because the determination of domicile is factual, the Attorney General opined that it could not make a definitive determination. Such a determination must be made by a court.

¹⁹SC Code §12-43-220(c).

5. Affiliations:

- Location of civic ties
- Place of worship
- Location of social memberships
- Maintaining a public library card or other privileges that require residency
- Business connections and relationships
- Location of professional services used (lawyer, doctor, etc.)

While there is no single factor that determines a person's domicile, the Department considers certain factors upon review of the facts and circumstances of each situation. The determination is based on a comparison of the amount of time spent in the states, types of activities engaged in by the taxpayer in the two states, and on the connections the taxpayer retains with the original state of domicile.

As stated earlier, the list of factors is not exhaustive and the factors alone do not necessarily indicate the domicile of an individual. The true test of domicile is the intent of the individual. Although the existence of certain documents, property, information, and affiliations can provide some indication of a person's domiciliary intentions, the absence of certain elements does not necessarily indicate a lack of domiciliary intent. Recent South Carolina Administrative Law Court cases, involving residency and domicile for property tax purposes, illustrate the factors and principles used to determine domicile. These principles apply equally to South Carolina income tax.

a. *F. Abbott Brown v Charleston County Assessor*²⁰

Mr. and Mrs. Brown purchased coastal property in South Carolina in 1997 while residents of, and domiciled in, Ohio. Mr. Brown retired in 1998 and separated from his wife in 1999 and moved out of the couple's Ohio home to the South Carolina home with intent of making it his permanent residence. He joined a local social club, established a local bank account, and made South Carolina the center of his business and social activities. Because of vehicle ownership and insurance matters entangled in the divorce proceedings, he did not register a vehicle, obtain a driver's license or register to vote in South Carolina during 2000. He filed a South Carolina income tax return for 2000 that listed an Ohio mailing address. While the return included a nonresident schedule because of his wife's residency in Ohio, that schedule clearly listed Mr. Brown as a full year South Carolina resident.

The sole issue before the South Carolina Administrative Law Court was whether the taxpayer was domiciled in South Carolina during the year in question (2000) and therefore entitled to receive a lower property tax assessment on his home (4% of the fair market value of the property instead of 6%). For purposes of the assessment ratio allowed pursuant to SC Code §12-43-220(c), a residence does not qualify as a legal residence unless the residence is determined to be the domicile of the owner-applicant.

²⁰03-ALC-17-0515 (June 16, 2004).

The Assessor denied the application based on his conclusion that the taxpayer failed to meet the burden of proof that he had established domicile in South Carolina because, among other things, he did not register a vehicle, register to vote, or obtain a driver's license in South Carolina in 2000 and because his 2000 South Carolina income tax return contained a non-resident schedule, listed an Ohio mailing address, and was prepared by an Ohio accountant. The Court disagreed and stated:

In denying Taxpayer's refund request, the Assessor relied too heavily upon Taxpayer's lack of certain documents. While Section 12-43-220(c)(2)(iv) sets forth a list of factors to be considered by the Assessor as proof of eligibility for the 4% assessment ratio, including the applicant's South Carolina income tax returns and South Carolina motor vehicle registrations, this list is not exhaustive and these factors are not necessarily dispositive of the question of domicile. As noted above, the true test of domicile is the intent of the putative domiciliary, not any particular set of documents. And, while the existence of certain documents can provide some indication of the domiciliary intentions of an individual, the lack of those documents need not necessarily indicate a lack of domiciliary intent. A life-long South Carolina resident who chooses not to drive or vote might not obtain a driver's license or voter registration, but would still certainly be considered a domiciliary of South Carolina. Similarly, even though Taxpayer's separation and divorce proceedings limited his ability to secure certain documentation indicating residence in South Carolina until 2001, Taxpayer established his domicile in South Carolina in 1999 by moving to his Kiawah home with the intent to make it his permanent residence.

b. *D. Bradlee Hodson v Charleston County Assessor*,²¹

Mr. Hodson, the taxpayer, claimed to be a resident of, and domiciled in, South Carolina during 2000 when he filed an application with the county assessor to receive a lower property tax assessment on his home (4% instead of 6%). He owned a South Carolina home on the coast since 1993 and rented it out until 1999. In 1997, he surrendered his University professorship and CPA practice in Maine. In 2000, he considered South Carolina his domicile, became president of the condominium regime, volunteered at a local hospital, and filed a South Carolina income tax return. In 2001, he obtained a South Carolina driver's license, registered his vehicle in South Carolina and registered to vote.

The issue before the South Carolina Administrative Law Court was whether the taxpayer was a legal resident of South Carolina during 2000 and therefore entitled to receive a lower property tax assessment on his home (4% instead of 6%). The statute²² provides that the owner-

²¹01-ALJ-17-0286 (October 30, 2001).

²²SC Code §12-43-220(c)(2)(iv).

applicant must provide proof of his domicile to the assessor. Such proof includes, *but is not limited to*:

- (A) A copy of the owner-occupant's most recently filed South Carolina individual income tax return;
- (B) Copies of South Carolina motor vehicle registrations for all motor vehicles registered in the name of the owner-occupant;
- (C) Other proof required by the assessor necessary to determine eligibility for the assessment ratio allowed by this item.

The county Assessor's office requires that an application be accompanied by proof of residency in one of four forms: voter registration, vehicle registration, a South Carolina driver's license, or a filed South Carolina tax return. Because the taxpayer provided a copy of his electronically filed return that was unsigned and undated, the assessor concluded the taxpayer was not a legal resident and domiciliary of South Carolina in 2000. It denied the application. The Court disagreed and determined the taxpayer was a legal resident and domiciliary of South Carolina during the year in question and entitled to receive the 4% legal residence classification for 2000.

In reaching its Conclusion, the Court stated:

I cannot find that the redacted copy of Taxpayer's 2000 South Carolina Income Tax Return is somehow insufficient to satisfy the proof of residency requirement of Section 12-43-220(c)(2)(iv). Taxpayer prepared his own 2000 Return and filed it electronically. Therefore, a signed original from which to make a copy does not exist. Further, Taxpayer testified that, as a CPA licensed in this State, he would never claim to have filed a South Carolina Return when in fact he had not. Finally, given Taxpayer's community involvement in the year 2000, from holding office in his regime association to volunteering at a local hospital, I find that Taxpayer's intent to make the Property his domicile is reflected in his actions, despite his tardiness in properly registering his vehicle or obtaining a South Carolina Driver's License.

5. Residency and Domicile Key Principles - Summary

Some key principles of domicile for South Carolina income tax purposes are summarized below.

- One Domicile. A person can have only one domicile at a time; one maintains his prior domicile until he establishes or acquires a new one. A person's domicile is not always the state where he is presently living.
- Residence. A person may have more than one residence, but cannot have more than one domicile or be a citizen of more than one state at the same time.²³ A person's state of residence is often the same as the person's state of domicile. The type of residence does not matter; the residence can be a rental home, a room, or a friend's home. No specified length of time is required to establish a place of residence in a new place; the act and intent and not the duration of residence are determinative.²⁴
- Intent. Intent is usually the most important element in determining the domicile of any individual. One of the essential elements to make a particular place as one's domicile is an intention to make the place a home in fact and to remain permanently, or for an indefinite time, in such place.
- Conduct. Any expressed intent on the part of a person must be evaluated in the light of his conduct which is either consistent or inconsistent with such expressed intent. When conduct and expressed intent are inconsistent, the person's actions are often more telling as to his true intent. Nevertheless, a person's actions may be less meaningful when the circumstances suggest the actions are easily reversible and were carried on deliberately to influence future decisions about domicile.
- Change of Domicile. Once a domicile is established, domicile remains in that state until the person establishes a new domicile in another state (or country). Thus, an individual's mere presence in another location will not change his domicile, even if he has disposed of his home in the first location. To lose domicile in South Carolina an individual must acquire a legal domicile elsewhere. A new domicile is acquired by choosing a new domicile and actually residing there with the intent that it is your principal and permanent residence. The intent to change domicile must be unqualified and not conditioned on a future event, such as finding a permanent job or acceptable housing. The intention to return at some indefinite, future time to a former domicile, commonly referred to as a "floating intention," does not destroy the new place of domicile. If a person has actually moved to a new abode, with the intention of remaining there for an indefinite time and establishing it as a place of fixed present domicile, that place is deemed to be the person's domicile, notwithstanding he may have a floating intention to return to his former domicile at some future time.

²³Further, it is possible for more than one state to assert that a person is domiciled in their state for income tax purposes.

²⁴*Nagy v Nagy-Horvath*, 273 S.C. 583, 257 S.E. 2d 757 (1979).

- Absence. A domicile (e.g., South Carolina), once established, is not lost by an absence from it for months or even years, for purposes of business or pleasure or the like, if during the absence there exists an intent to be absent from South Carolina merely temporarily or an intent to resume residence in South Carolina following the completion of the purpose of the absence.
- Spousal Presumption. One spouse is presumed to have the same state of domicile as the other spouse. This presumption is overcome by evidence of legal separation or other evidence adequate to show that the other spouse actually resides in another place and intends for that place to be a home to which he or she would return when away. See Section B.1.
- Burden of Proof. Generally, the burden of showing a change of domicile is on the party asserting the change.

B. Residence and Domicile Determination and Tax Rules for Specific Individuals

1. Separate Residences or Domiciles of Husband and Wife (Matrimonial Domicile)

Under the common law doctrine of matrimonial domicile, the domicile of the husband is the domicile of the wife, except in certain unusual circumstances, such as legal separation. This common law “fiction” of merging the identity of the wife with the husband (*i.e.*, the wife losing her own domicile upon marriage and acquiring that of her husband, no matter where the wife actually lives or what she intends) has been eroded over time by case law. Today, a married woman can establish her own domicile separate from her husband for any reason.²⁵

The evolution of the theory that a husband and wife can establish separate domiciles for South Carolina income tax purposes is analyzed below. The concept of matrimonial domicile was mentioned by the South Carolina Supreme Court in 1940 in *Phillips v. South Carolina Tax Commission*²⁶ where it concluded that Mr. Phillips was a legal resident of Virginia for income tax purposes. The Court found that the fact that Mr. Phillips, his wife, and son lived six months of each of the years in question in South Carolina, that his wife was a member of the board of trustees for the local South Carolina school district, and that his son graduated from a South Carolina high school and attended the Citadel as a South Carolina resident “have little or no significance for of course the law is clear that except in certain unusual circumstances the domicile of the husband is the domicile of the wife.”²⁷

²⁵1976 S.C. Op. Atty. Gen. 145. This opinion concluded that an amicably married woman living with her husband on a South Carolina military base would not be prohibited from establishing her own residency for purposes of voting in South Carolina even though her husband did not declare South Carolina as his state of residency.

²⁶195 S.C. 472, 12 S.E. 2d 13 (1940). See Section A.3 above for a complete discussion of *Phillips v. South Carolina Tax Commission*.

²⁷195 S.C. 472, 12 S.E. 2d 13,18 (1940).

Comment: Although it has never been overruled by the South Carolina courts, many commentators believe that the statements of the Court in *Phillips* dealing with Mrs. Phillips would not likely be upheld by modern day courts.²⁸

There are a number of 1940 to 1970 South Carolina Attorney General's Opinions that express the view of the Court in *Phillips* for determining a wife's domicile.²⁹ In 1976, however, the Attorney General noted that "the trend in law is to abandon the common law theory of merging the identity of the husband and wife to allow married women to establish their own domicile separate from their husbands for any reason." The opinion cautions, however that the law pertaining to this area is less than clear within the state.³⁰

For South Carolina tax purposes, however, this issue has rarely been examined by the courts. Some of the more recent thinking in this area for South Carolina income tax and property tax is discussed below.

a. Property Tax

In property tax matters, the issue of separate domiciles for married couples has been considered a number of times by the Department and the South Carolina Administrative Law Court in connection with the lower 4% property tax assessment ratio for legal residences. Although these cases deal with domicile in terms of separate houses, the principles relied on can be applied to issues of separate domiciles in different states or countries for income tax purposes. See caution below for property tax purposes.

1. In Commission Decision #92-4 (January 16, 1992), the Commission reviewed whether a husband and wife having residences a short distance apart each had established separate legal residences eligible for the lower 4% property tax assessment ratio. The Commission determined that it was the intent of the General Assembly when enacting SC Code §12-43-220(c) that one spouse would not be permitted to claim a domicile different from the other except in exceptional circumstances...such is in accord with public policy because, under the laws of this State, the husband continues to have the responsibility to maintain and care for the welfare of the wife. The Commission determined that

²⁸See, "[A]n inglorious fiction": The Doctrine of Matrimonial Domicile in South Carolina, 18 Wis. Women's L.J. 233 (2003), footnote 92.

²⁹**Caution:** These opinions are provided for historical purposes only; the thinking in this area has changed over the past several decades. South Carolina Attorney General Opinion No. 2250 (March 28, 1967) addressed the domicile of a wife of a military serviceman stationed outside of South Carolina who retained South Carolina as his legal residence. The wife, at the time of marriage, was a resident of another state, and the husband, at the time of marriage, was stationed outside South Carolina. Since marriage, the wife has not physically resided in South Carolina. Citing *Phillips*, the opinion concluded that the wife of the serviceman whose legal residence or domicile is within South Carolina acquires, upon marriage, South Carolina as her state of domicile. Also, see Op. SC Atty. Gen. of Sept. 10, 1965 finding that "[t]he domicile of the wife is presumed to be that of her husband, where there has been no legal separation." *Cone v. Cone*, 39 S.E. 748, 61 S.C. 512 (1901). "The residence of a wife follows that of her husband." 1947-48, Attorney General Opinion, p. 142."

³⁰1976 S.C. Op. Atty. Gen. 145.

“appropriate circumstances” to maintain a separate legal residence were not established and found no evidence that a happily married couple spending 75% of their nonworking time together could maintain separate legal residences. The Commission added that this, however, is not to say that under compelling circumstances the wife cannot maintain a separate legal residence and stated:

In the absence of a statute abolishing the disabilities of married women, a wife generally has no power of acquiring a domicil[e] of her own, separate and apart from her husband. But the law recognizes exceptions to the rule that the domicil[e] of a married woman is that of her husband, on the basis that the purpose of such rule is the promotion of the best interests of the spouses and that when a situation arises in which the interests of the spouses are not identical, the wife should be permitted to choose her own domicil[e].

Thus, it has been declared generally that a married woman may acquire a separate domicil[e] in “appropriate circumstances” or whenever it is necessary or proper that she should do so. The right springs from the necessity for its exercise and endures as long as the necessity continues. If a wife is living apart from her husband for justifiable reasons, or where, without fault on her part, she is compelled to live apart from her husband, she has the capacity to establish domicil[e] of her own.

2. Later South Carolina Administrative Law Court decisions call into question the reasoning of Commission Decision #92-4.

In *Charleston County Assessor v Barbara A. Snelling*,³¹ the South Carolina Administrative Law Court reviewed whether a resident female who is legally married to a man domiciled in another state qualifies for the 4% legal residence property tax assessment ratio for her home in South Carolina. The property tax assessor denied the application for the legal residence assessment ratio solely on the ground that, under the interpretation of South Carolina common law, the law presumes that the resident wife cannot be domiciled in South Carolina because her husband is domiciled in another state. The Court concluded that the Assessor’s policy on this point was based on an obsolete understanding of the rights of married women and violated the equal protection guarantees of both the United States and South Carolina Constitutions. The Court found there is nothing in SC Code §12-43-220(c) or in recent South Carolina case law to suggest that the Assessor’s policy on the matrimonial domicile of married women was required by, or even accepted under, South Carolina law.

Caution: SC Code §12-43-220(c) allows for a reduced 4% assessment ratio on a person’s legal residence (domicile). Qualifications necessary to obtain the lower assessment were amended in 2012 in a way that may affect the legal residence (domicile) for property tax purposes of a

³¹01-ALJ-17-0298 (October 19, 2001). See also *Charleston County Assessor v Charles H. and Susan W. Hodges*, 01-ALJ-17-0241-CC (October 19, 2001) and *Charleston County Assessor v William and Lona Hardy*, 1-ALJ-17-0296-CC (October 19, 2001).

married couple living in separate residences. This amendment, however, does not affect a married couples ability to establish separate domiciles for income tax purposes.

b. Income Tax

South Carolina Code §12-6-5000 provides for the filing of joint income tax returns of spouses. It specifically allows a resident spouse and a nonresident spouse to file jointly.

Comment: This statute along with the instructions to the SC 1040 gives some indication that a married woman may have a domicile separate from her husband for individual income tax purposes.

The general instructions to the SC 1040 summarize the Department's longstanding position regarding married couples having a different state of domicile. The question and answer in the instructions state:

Question: I am a full year South Carolina resident, but my spouse is not. How should we file?

Answer: If you file a **joint** federal return, you must file a **joint** SC1040 with Schedule NR. The resident spouse will report to South Carolina all income for the entire year.³² The spouse who is not a resident of the joint return will only report income earned in this state, if any.³³

If you file **separate** federal returns, you must file a **separate** South Carolina return. Your spouse must also file a **separate** South Carolina return if he/she has income taxable by South Carolina.

2. Foreign Domicile or Expatriate (Person Working Outside the United States)

A United States citizen domiciled in South Carolina but living in a foreign country is still subject to South Carolina's income tax laws and is required to file a South Carolina income tax return if the minimum filing requirements are met. An expatriate is taxed on all personal service income earned in the foreign country that is included in federal taxable income. South Carolina has adopted Internal Revenue Code §911, "Citizens or Residents of the United States Living

³²The form instructions are misleading. Under South Carolina law, residents are not taxed on their worldwide income. Instead, South Carolina residents are taxed on their worldwide personal service income, but are **not** taxed on their worldwide (non personal service) business income. See **Chapter 6** for a more complete discussion.

³³In general, under South Carolina law, a nonresident individual is taxed on his share of personal service income earned in South Carolina and his allocated or apportioned share of business income derived from South Carolina. A proportion of the federal personal exemption amount and applicable itemized deductions or standard deduction are allowed in computing the nonresidents South Carolina taxable income. See **Chapter 6** for a more complete discussion.

Abroad,” but has not adopted Internal Revenue Code §§861 – 908³⁴ and 912,³⁵ 931 – 940,³⁶ and 944 - 989.³⁷ Thus, if a person has earned income in a foreign country, he may qualify for the federal foreign earned income exclusion. If a person qualifies and his foreign earned income is not taxed on his federal return, this income is not taxed by South Carolina. Earned income above the federal earned income exclusion and unearned income that does not qualify for the exclusion is subject to South Carolina income tax.

For income tax purposes, residency issues often arise when a person living in South Carolina relocates to a foreign country for a specific number of years or an indefinite period under a temporary visa or work permit. The individual often claims he has changed his domicile to the foreign country and is not required to file a South Carolina income tax return during the years he is residing in the foreign country. The Department disagrees. Whether the individual abandoned his South Carolina domicile and established a new one depends on whether the individual’s intent is to abandon his South Carolina home and make a new place a home in fact to which he will return when away.

In Commission Decision I-D-359, the Department reviewed whether taxpayers working in a foreign country remained residents required to report all personal service income earned in the foreign country to South Carolina. The Department concluded that the taxpayers were at all times residents of South Carolina and that all income earned should have been reported on the South Carolina return. The taxpayers, asserting they were nonresidents, filed their returns for the years in question, but in each year did not include personal service income earned in the foreign country on their South Carolina returns. The Commission concluded that the taxpayers never abandoned their domicile in South Carolina and thus were residents of South Carolina during the years in question. The facts demonstrated that the taxpayers maintained their home in South Carolina at all times during the years in question. Further, both returned to South Carolina after leaving the foreign country, maintained their South Carolina driver’s license, and did not establish any objective factors supporting an alleged intention to sever their ties with South Carolina or establish a new domicile in the foreign country.³⁸

³⁴The provisions contained in these sections include source rules and other general rules relating to foreign income, taxation of nonresident aliens and foreign corporations, tax on gross transportation income, miscellaneous provisions, and the foreign tax credit.

³⁵This section pertains to “Earned Income of Citizens or Residents of United States” – Exemption for certain allowances.

³⁶These sections pertain to possessions of the United States.

³⁷Some of these provisions have been repealed. The provisions contained in these sections concern controlled foreign corporations, admissibility of documentation maintained in foreign countries, and foreign currency transactions.

³⁸Commission Decision I-D-359 (May 23, 1984).

SC Reg. §117-620.1 addresses when a South Carolina resident changes domicile to a foreign country and reads:

Where it can be shown that an individual has become domiciled in a foreign country and, therefore, no longer a resident of this state and has severed all connections with this state and has clearly shown his or her intention to reside abroad permanently with no intention of returning to South Carolina, such individual is not subject to the income tax laws of this state.

3. Student

In general, a student who attends school with the intention of remaining there only as a student and only until the course of education is completed does not acquire a domicile there. The student remains a resident of the state of his permanent residence (generally the domicile of a minor's parents), even if he attends school full time in another state. This rule applies to both adults and minors.³⁹

For income tax purposes, residency issues often arise when a student is working and earning wages during the school year or in the summer. A student who is a South Carolina resident attending school in another state remains a South Carolina resident. As a South Carolina resident, he must pay South Carolina income tax on all personal service income earned, whether earned in South Carolina or another state. To prevent double taxation of the same income, a resident individual is allowed an income tax credit for income taxes paid to another state on income which is also taxed in South Carolina.⁴⁰ His unearned income, such as interest income on his out of state bank account, is also subject to South Carolina income tax. The resident student would file a SC 1040. See **Chapter 2** for the minimum gross income filing requirements of a resident individual.

Likewise, a student from another state attending school in South Carolina is considered a nonresident. As a South Carolina nonresident, he is subject to South Carolina income tax on all income from personal services rendered in South Carolina.⁴¹ Unearned income, such as interest income on his South Carolina bank account and personal service income earned outside of South Carolina is not subject to tax in South Carolina. The nonresident student files form SC 1040 with Schedule NR. See **Chapter 2** for the minimum gross income filing requirements of a nonresident individual.

³⁹*Domicil* 25 Am Jur 2d §32 (Students).

⁴⁰SC Code §12-6-3400.

⁴¹To avoid double taxation, the student, depending on the tax law in his home state, may be entitled to a credit for South Carolina taxes paid on an income tax returned filed in his home state.

4. Military Servicemember and Servicemember's Spouse

See **Chapter 10** for a complete discussion of military servicemember's special domicile and state tax rules. Also, see **Chapter 10** for a complete discussion of the servicemember's spouse special domicile and state tax rules.

5. Alien

The income taxation of an alien (*i.e.*, a person who is not a United States citizen) often arises in South Carolina when a foreign individual comes to the United States to enroll in college classes or to work in a South Carolina school, hospital, or manufacturing facility.

The taxation of an alien and the determination of domicile for an alien is made in the same way as it is made for any individual. See Section A above for a complete discussion of determining a taxpayer's residence or domicile and for factors that are considered when determining if an individual is a "South Carolina resident" or "South Carolina nonresident" for individual income tax purposes.

In general, two questions must be answered in determining domicile of an alien.

1. What is the status of the individual's citizenship or nature of the visa admitting him to the United States?
2. Does the individual intend to make South Carolina his true fixed and permanent home and the state to which he will return when away?

For South Carolina income tax purposes, an alien may be considered domiciled in South Carolina for tax purposes if he has an "immigrant visa or green card." This visa grants lawful permanent residence into the United States.

In contrast, an alien with a non-immigrant visa granting temporary presence in the United States generally cannot acquire South Carolina as his domicile. Certain types of non-immigrant visas may allow an alien to establish the necessary intent to establish domicile.⁴² While there are over 100 types of visas, the most common temporary visas issued are:

- F-1 Student Visa
- H-1 Work Visa
- J-1 Visa (au pair, teacher, or physician)

6. Children and Parents

See **Chapter 2** for a discussion of the filing requirements and issues for children and parents.

⁴²See *Toll v Moreno*, 458 U.S. 1, 102 S.C. 2977 (1982).